IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.1354 OF 2003

Dattatray Shankarrao Ghorpade ...Petitioner

Vs.

Shriniwas Vishnu Ghorpade ...Respondent

Mr.M.S.Lagu for Petitioner
Mr. P.D. Dalvi for Respondent Nos.1A to 1F

CORAM: SMT. ROSHAN DALVI, J.
DATED: 13TH MARCH, 2006

P.C.

. Rule. Returnable forthwith.

1. The Petitioner and the original Respondent (Respondent) were brothers. The Respondent sued the Petitioner for declaration that a sale deed executed in favour of their mother was void and for possession of the suit property. The suit was dismissed.

2. In the appeal therefrom a compromise decree was passed on 18th December 1996. It was agreed that the respondent as the plaintiff in that suit was entitled to 1/3 share in the suit property.

3. An execution application by way of partition of the property and separate possession was taken out by the Respondent (Plaintiff). A Court Commissioner was appointed and directed to effect partition of the

suit property by the order of the learned Civil Judge (S.D.) Kolhapur dated 24th January 1997.

4. The Court Commissioner submitted his report on 15th March 1997 after following the provisions of Order 26 Rules 13 & 14 of the C.P.C. An application was taken out by the petitioner (defendant) against that application which came to be rejected on 23rd April 1997.

5. The Court Commissioner's report duly filed in Court has, therefore, to be executed.

6. The petitioner contends that since this is a partition suit the compromise decree tentamounts to a preliminary decree passed under Section 20 Rule 18 of the C.P.C. and such a decree is not executable.

7. Upon such preliminary decree being passed, the Court Commissioner has been appointed under the provision of Order 26 Rule 13 to partition the property by metes and bounds following the procedure laid down in Order 26 Rule 14. That exercise has been completed in 1997 itself.

8. The Court Commissioner's Report following the procedure under Order 26 Rule 14, once confirmed or accepted by the Court itself constitutes a final

decree under Order 26 Rule 14(3) which is only to be drawn up.

9. The petitioner has relied upon the judgment of Bombay High Court, Nagpur Bench in the case of Bashiruddin Mohiuddin Vs. Binraj Murlidhar reported in 1986(3) Bom. C.R. 590, **in which it is held that when no final decree is passed, no execution proceedings can be taken out. That is indeed the correct position in the law. The preliminary decree determines the shares. The final decree shows actually how the shares are to be apportioned among the parties i.e. how the property has to be partitioned. The procedure to that end is laid down in Order 26 Rule 14. Once that procedure is followed and the Court Commissioner's report is accepted by the Court and is not modified or set aside, it would amount to a final decree passed by the Court which has only to be drawn up. What is contemplated in this judgment therefore, is that when a preliminary decree is passed only setting out the extent of shares it can actually not be executed until which precise share goes to which precise party has been determined, which is done by the Commissioner in his report. That exercise has been undertaken in this case.**

10. The Petitioner also relies upon the judgment of the Honourable Supreme Court in the case of M.L.

Subbaraya Setty Vs. M.L.Nagappa Setty reported in AIR 2002 SC 2066. **In that judgment how the final decree is ultimately to be passed is set out in paragraph 33. That is by following the procedure under Order 20 Rule 18 and the Order 26 Rules 13 & 14. Following upon that it is laid down in para 34 that the actual partition is effected by passing the final decree. Such final decree would be in terms of the Commissioner's Report. In this case also the actual partition has to be effected as shown in the Commissioner's report.**

11. The 3rd judgment relied upon by the petitioner is in the case of Shankar Lokhande Vs. Chandrakant Lokhande reported in AIR 1995 SC 1211, **in which it is held that until the final decree determining the rights of the parties by metes and bounds is passed, there can be no executable decree. In this case the final decree is as contained in the commissioner's report.**

12. The Respondent (plaintiff) could not have per se executed the compromise decree which laid down the extent of his share being 1/3rd-in the property. Had that been done, the Petitioner's contention, at that stage, that the compromise decree which was a preliminary decree could not be executed, would have had substance. That had to be followed by the procedure under Order 26 Rule 13 as reflected in the

Court Commissioner's report for the actual partition by metes and bounds. That report has been accepted. The application of the petitioner thereto has been rejected. Hence the final decree has to be drawn up in terms of the Court Commissioner's Report, duly accepted by the Court. That is the final decree. Therefore the final decree is executable in terms of the report of the Court Commissioner.

13. The Writ Petition is therefore, rejected.

. The Civil Judge, Senior Division, Kolhapur shall draw up the Final Decree in terms of the Court Commissioner's Report for partitioning the suit property by metes and bounds forthwith and execute the Compromise Decree dated 18th December 1996 in terms of the execution application taken out by the Respondent (Plaintiff) forthwith.

14. Mr.Lagu on behalf of the Petitioner applies for stay of this order. He relies on the judgment of Justice Oka in a case of Govinda Bhagoji Kamable Vs. Sadu Bapu Kamable reported in 2005(1) Mh.L.J., 651, in which it is held that stay granted "in the meanwhile" continues till the hearing of the application. He contends that the stay in this Writ Petition has been so granted and therefore, applies for its continuation.

15. In this Writ Petition stay has been granted initially on 21st March 2003 upto 21st April 2003 and then on 19th April 2003 when the Petition was S.O. after vacation, the stay was granted "till then". It has not been further extended. The Respondent has had to wait for getting his 1/3rd agreed share for the last more than 8 years. The Petitioner's contention on merits totally backs bonafides. The Stay is, therefore, not extended.

(ROSHAN DALVI,J.)